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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

Capitol Electric Construction Co., Inc. and Donald Sekelsky, individually and d/b/a Sekelsky Enterprises Co.,	)	**Docket No. TSCA-I-92-1062**
Respondents	)	

Toxic Substances Control Act -- Default Order -- Where Respondents failed to respond to order for prehearing exchange, Respondents were declared to be in default and to have committed the violations charged in the Complaint, and were subjected to the civil penalty proposed by the Complaint.

Appearances

For Complainant:

Michael P. Kenyon, Esq.
Assistant Regional Counsel
Region I
U.S. Environmental Protection Agency
JFK Federal Building, RCA-1903
Boston, Massachusetts 02203

For Respondents:

Thomas E. Minogue, Jr., Esq.
Kleban & Samor, P.C.
2425 Post Road, P.O. Box 763
Southport, CT 06490

Before

Thomas W. Hoya
Administrative Law Judge

DEFAULT ORDER

This Default Order is issued in a proceeding initiated under Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a). Complainant is the Regional Administrator, Region I, U.S. Environmental Protection Agency, and Respondents are the Capitol Electric Construction Co., Inc. and Donald Sekelsky, individually and d/b/a Sekelsky Enterprises Co. Respondents are declared by this Default Order to have violated TSCA and regulations ("the Regulations") promulgated pursuant to TSCA, 40 C.F.R. Part 761.

Accordingly, an order is imposed on Respondents that assesses a civil penalty of $25,000. This issuance of a Default Order grants Complainant's Motion for Default Order filed July 23, 1993.

Procedural Background

The Complaint, issued July 1, 1992, alleged that Respondents, a Connecticut corporation and its president respectively, contracted in 1989 with another Connecticut corporation to remove and dispose of three PCB transformers.[1] Respondents performed the contract and were compensated therefor, according to the Complaint, and in 1991 the transformers were found in a municipal recreation area in Fairfield, Connecticut where they had been dumped.

The Complaint charged that Respondents failed to dispose of the three PCB transformers properly, in violation of 40 C.F.R. § 761.60(b)(1). The Complaint charged further, as part of its sole count, that Respondents distributed in commerce the three PCB transformers for disposal without complying with the requirements of 40 C.F.R. § 761.60(b)(1), a violation of 40 C.F.R. § 761.20(c). For these violations, the Complaint proposed a $25,000 civil penalty.

Respondents filed a July 30, 1992 Answer to the Complaint that admitted the contracting, the performance, and the compensation, but either denied or asserted no knowledge regarding most of the remaining allegations. The Answer offered no explanation of its denials and assertions.

After the parties failed to negotiate a settlement, they were ordered to make a prehearing exchange by January 15, 1993. Complainant made a prehearing submission in compliance with this order. Respondents, however, made no prehearing submission, and have in fact filed nothing since their Answer to the Complaint.

Complainant moved July 23, 1993 for a default order, serving Respondents by first class mail. Respondents then were ordered on

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[1] As defined at 40 C.F.R. § 761.30.

May 20, 1994 to show cause by June 20, 1994 why a default order should not be issued against them, such order being served by certified mail for which a receipt of delivery was returned to this Office. As noted, Respondents have filed nothing since their Answer.

Respondents' Violations

Procedure for this case is governed by the Consolidated Rules of Practice ("Consolidated Rules") issued by the U.S. Environmental Protection Agency ("EPA") at 40 C.F.R. Part 22. Section 22.17(a) of the Consolidated Rules (40 C.F.R. § 22.17 (a)), applying to motions for default, provides in pertinent part as follows.

§ 22.17 Default Order.

> (a) Default. A party may be found to be in default ... (2) after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer .... Any motion for a default order shall include a proposed default order and shall be served upon all parties. The alleged defaulting party shall have twenty (20) days from service to reply to the motion. Default by respondent constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations. If the complaint is for the assessment of a civil penalty, the penalty proposed in the complaint shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued upon default.

As described above, the Complaint and Answer were previously filed and an order was issued directing a prehearing exchange. While Complainant has fully complied with the order, Respondents have filed nothing since their Answer, and are thus in default. Complainant has moved for a default in the manner prescribed by Section 22.17(a).

Accordingly, Respondents are declared in default. Such default, per Section 22.17 (a), "constitutes ... an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations."

The Complaint stated an enforceable claim for the violations alleged therein. Furthermore, its allegations are supported by Complainant's prehearing exchange and by admissions in Respondents' Answer. In view of these factors, added to the force of Section 22.17(a), it is concluded that Respondents committed the violations charged in the Complaint, as discussed in more detail below.

The Complaint alleged that Respondent Capitol Electric

Construction Company, Inc. ("Capitol") is a Connecticut corporation that, at all times relevant to this Complaint, owned and operated an electrical contracting firm at 14 Montgomery Street in Bridgeport, Connecticut.[2] The Complaint alleged further that Respondent Donald Sekelsky is president of Capitol and additionally does business as Sekelsky Enterprises Co., also located at 14 Montgomery Street in Bridgeport, Connecticut.[3] Respondents' Answer admitted these allegations.[4]

The Complaint charged further, and the Answer admitted, that in or about August 1989, Respondents entered into a contract with Fischel Corporation ("Fischel"), of Norwalk, Connecticut, to remove and dispose of three PCB transformers from Fischel's Underwood Commerce Building on Broad street in Bridgeport, Connecticut.[5] The Respondents, as alleged in the Complaint and admitted in the Answer, performed and were compensated for performance of this contract.[6]

The Complaint went on to charge that on or about December 6, 1991 the same three PCB transformers were found in a municipal recreation area, located at Old Dam Road in Fairfield, Connecticut, where they had been dumped.[7] The Complaint charged additionally that these three PCB transformers had leaked approximately 100 gallons of PCB dielectric fluid onto the ground where they were found.[8] As to these factual allegations, the Answer stated that Respondents had no knowledge. Under Section 22.15(b) of the Consolidated Rules, these statements in the Answer are treated as a denial.

The Complaint then summarized certain provisions of the Regulations substantially as follows. Pursuant to 40 C.F.R. § 761.60(b)(1), PCB transformers must be disposed of either in an incinerator or in a chemical waste landfill that complies with the PCB regulations.[9] The distribution in commerce of PCB transformers without an exemption other than for purposes of disposal in

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[2]Complaint ¶ 3.

[3]Complaint ¶ 4.

[4]Answer ¶¶ 1-6.

[5]Complaint ¶ 5; Answer ¶¶ 1-6.

[6]Complaint ¶ 6; Answer ¶¶ 1-6.

[7]Complaint ¶ 7; Answer ¶¶ 7-10.

[8]Complaint ¶ 8; Answer ¶¶ 7-10.

[9]Complaint ¶ 12; Answer ¶ 12.

accordance with the requirements of 40 C.F.R. § 761.60(b)(1) is prohibited by 40 C.F.R. 761.20(c).[10] Also as to these factual allegations, the Answer stated that Respondents had no knowledge, a statement that becomes a denial under the Consolidated Rules.

Finally, the Complaint charged that Respondents failed to dispose of the three PCB transformers properly, in violation of 40 C.F.R. § 761.60(b)(1).[11] The Complaint charged in addition that Respondents distributed in commerce the three PCB transformers for disposal not in accordance with the requirements of 40 C.F.R. § 761.60(b)(1), in violation of 40 C.F.R. § 761.20(c).[12] The Answer denied these charges. The Answer denied also the Complaint's allegation that Respondents, pursuant to their contract with Fischel, were responsible for the removal and disposal of the three PCB transformers found at the recreation area.[13]

Nevertheless these denials, whether expressly asserted or implied from Respondents' statements of no knowledge, serve Respondents little, since Respondents have been declared to be in default. As stated above, under Section 22.17(a) of the Consolidated Rules (40 C.F.R. § 22.17(a)), such default "constitutes ... an admission of all facts alleged in the complaint."

In this case, moreover, the Complaint is supported by Complainant's prehearing exchange submission. Several exhibits offered by Complainant document the 1989 contract between Respondents and Fischel for removal of the three transformers.[14]

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[10]Complaint ¶ 13; Answer ¶ 13.

[11]Complaint ¶ 13; Answer ¶ 13.

[12]Complaint ¶ 14; Answer ¶ 14.

[13]Complaint ¶ 11; Answer ¶ 11.

[14]See Complainant's Prehearing Exchange, Exhibit 13 (memo from Charles A. Card, former Fischel employee, to Patricia Cleary, Underwood Commerce Condo Association employee, referring to Capitol Electric as the party responsible for providing a manifest showing where transformers were disposed of); Exhibit 15 (Partial Waiver of Lien executed by Fischel and Sekelsky Enterprises for the sum of seven thousand dollars ($7,000.00)); Exhibit 16 (invoice given to Fischel by Capitol Electric for the removal and installation of transformers at the Underwood Building); Exhibit 17 (invoice given to Capitol Electric by Valley Trucking & Rigging, Inc. for the moving of transformers in the Underwood Building); Exhibit 18 (invoice given to Fischel from Sekelsky Enterprises for the rigging and removal of old transformers as well as the installation of new transformers at the Underwood Building); and Exhibit 19 (a check,

Other proffered exhibits document the 1991 discovery of the three transformers in the municipal recreation area and the leakage of the PCB dielectric fluid onto the ground.[15]

In sum, it is concluded that Respondents, as charged in the Complaint, violated TSCA by violating Sections 761.60(b)(1) and 761.20(c) of the Regulations. This conclusion is based on Respondent's default, the Complaint, the Answer, and Complainant's prehearing exchange submission.

Civil Penalty

The remaining issue is the appropriate civil penalty. In the Complaint, the proposed amount was $25,000. As quoted above,[16] one section of the Consolidated Rules states that "the penalty proposed in the complaint shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued upon default." This section suggests an automatic acceptance of the Complaint's proposed $25,000 penalty.

The Consolidated Rules, however, contain also a section titled "Amount of civil penalty" that includes specific instructions for default situations.

> § 22.27 Initial Decision
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> * * *
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> (b) Amount of civil penalty. If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the

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payable to Sekelsky enterprises in the amount of seven thousand dollars ($7,000.00), drawn on the account of Underwood Commerce Condo Association and signed by Patricia Cleary).

[15]See Complainant's Prehearing Exchange, Exhibit 1 (Lori Saliby's report of her December 10, 1991 inspections of both the Fairfield tennis bubble and the Fairfield Public Works Garage); Exhibit 4 (photographs 01 and 02, taken during the December 10, 1991 inspection of the Fairfield tennis bubble); Exhibit 5 (photographs 03 and 04, taken during the December 10, 1991 inspection of the tennis bubble and Public Works Garage); Exhibit 6 (Fairfield Police Incident Report, dated December 6, 1991); Exhibit 7 (Fairfield Police Incident Report, dated December 9, 1991); and Exhibit 11 (map grid showing the concentrations of PCB soil contamination at the tennis bubble).

[16]See the first text paragraph supra under the heading Respondent's violations.

> initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. The Presiding Officer shall not raise a penalty from that recommended to be assessed in the complaint if the respondent has defaulted.

The sentence referring to a default situation implies a responsibility of the Presiding Officer to review the amount of the civil penalty.[17] Accordingly, it will be reviewed.

Section 22.27(b) of the Consolidated Rules (40 C.F.R. § 22.27(b)) requires that the recommended civil penalty "be assessed ... in accordance with any criteria set forth in the Act." To determine penalties in administrative civil actions brought pursuant to the section of TSCA at issue here--Section 16--EPA employs its Polychlorinated Biphenyls (PCB) Penalty Policy, dated April 9, 1990.[18]

This Penalty Policy provides for the calculation of a civil penalty in two stages: (1) determination of a "gravity based penalty" ("GBP"), and (2) adjustments to the GBP.[19] The GBP is derived from a matrix in which one axis represents "the extent for potential damage," and the other axis the "circumstances" of the violation, which reflect its probability of causing harm.[20] The extent for potential damage axis has three gradations: "major," "significant," and "minor."[21] The circumstances axis has six levels divided into three ranges of "high," "medium," and "low."[22] At each point where a gradation from one axis intersects a level from the other axis, a penalty amount is provided. Once the GBP

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[17]This responsibility to review the amount of the civil penalty is suggested also by Katzson Bros., Inc. v. U.S. E.P.A., 839 F.2d 1396 (10th Cir. 1988).

[18]See EPA's "Notice of Availability of Polychlorinated Biphenyls Penalty Policy," 55 Fed. Reg. 13,955 (April 13, 1990).

[19]Polychlorinated Biphenyls (PCB) Penalty Policy (April 9, 1990) at 1.

[20]Id. 3-9.

[21]Id.

[22]Id.

has been established, adjustments to the proposed penalty amount may be made in consideration of other factors: culpability, prior violations of TSCA, ability to pay and continue in business, and other matters that justice may require.[23]

It was on the basis of this PCB Penalty Policy that Complainant justified its proposed civil penalty of $25,000.[24] This justification has been reviewed, as discussed briefly below, and adjudged to be reasonable. Accordingly, a civil penalty of $25,000 is assessed against Respondents.

The sole count in this case involved the improper disposal and distribution in commerce of PCB transformers, in violation of the Regulations. In calculating the GBP under the PCB Penalty Policy, Complainant determined the extent of the violation to be "major," because that category is for disposals exceeding 25 gallons,[25] and each of the three dumped PCB transformers here contained 62 gallons.

Complainant set the level of the violation at "level 1," which is for "any leakage or spills [of PCBs] from a storage container."[26] Here the allegation is that about 100 gallons of PCB dielectric fluid leaked onto the ground from the three dumped PCB transformers. In the gravity based penalty matrix, the combination of a major violation at level 1 produced for Complainant a proposed GBP of $25,000.[27] The preceding review of this GBP shows it to have been rationally established.

In considering the adjustment factors, Complainant found no upward or downward revision of the GBP to be necessary. Complainant's conclusions here, as summarized below, are reasonable.

With regard to the culpability factor, Complainant asserted that Respondents knew or should have known of the relevant requirements and the possible dangers of their actions. Under the PCB Penalty Policy, this degree of culpability requires no

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[23]Id. 14-19.

[24]Complainant's Prehearing Exchange, Exhibit 22.

[25]See Polychlorinated Biphenyls (PCB) Penalty Policy (April 9, 1990) at 7.

[26]See Polychlorinated Biphenyls (PCB) Penalty Policy (April 9, 1990) at 10.

[27]See Polychlorinated Biphenyls (PCB) Penalty Policy (April 9, 1990) at 9.

adjustment to the GBP.[28]

As to prior TSCA violations, Respondent has no record of any.[29] Consequently Complainant made no adjustment of the GBP, because the gravity based penalty matrix is designed to apply to "first offenders."[30]

In considering Respondents' ability to pay and continue in business, Complainant employed a Dun & Bradstreet report for Capitol, which revealed that the company has annual sales between $300,000 and $400,000 and employs five (5) persons. Based on this report, Complainant concluded that Capitol would suffer no serious harm as a result of the proposed penalty.

The last item is "other factors as justice may require" that should result in either an upward or downward adjustment of the penalty. Complainant found no such factors in this case. As noted above, Complainant's overall decision to make no revision of the $25,000 GBP is justified.

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[28]See Polychlorinated Biphenyls (PCB) Penalty Policy (April 9, 1990) at 15. Complainant did not claim that the violations were willful; willfulness would have adjusted the GBP upward by 25 percent. Id.

[29]Complainant's Proposed Order Defaulting Respondent, Exhibit A at 3.

[30]See Polychlorinated Biphenyls (PCB) Penalty Policy (April 9, 1990) at 15.

ORDER[31]

Respondents are found to be in default with respect to the Complaint and, as charged therein, are found to have violated TSCA by violating Sections 761.60(b)(1) and 761.20(c) of the Regulations. For this default and these violations, Respondents are assessed a civil penalty of $25,000.

Therefore, pursuant to 40 C.F.R. § 22.17, Respondents are hereby ordered to pay a civil penalty of twenty-five thousand dollars ($25,000). Payment shall become due according to 40 C.F.R. § 22.17(a), and shall be made by forwarding a cashier's or certified check, payable to the "Treasurer, United States of America," to:

EPA - Region I
P.O. Box 360197M
Pittsburgh, PA 15251

Failure to pay the civil penalty imposed by this Default Order shall subject Respondent to the assessment of interest and penalty charges on the debt pursuant to 4 C.F.R. §§ 102.13(b),(e).

Thomas W. Hoya
Administrative Law Judge

Dated: November 15, 1994

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[31]This Default Order constitutes an Initial Decision as provided in 40 C.F.R. § 22.17(b). Pursuant to Section 22.27(c) of the Consolidated Rules, 40 C.F.R. § 22.27(c), an Initial Decision "shall become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceedings unless (1) an appeal to the Environmental Appeals Board is taken from it by a party to the proceedings, or (2) the Environmental Appeals Board elects, sua sponte, to review the initial decision." Under Section 22.30(a) of the Consolidated Rules, 40 C.F.R. § 22.30(a), the parties have twenty (20) days after service upon them of an Initial Decision to appeal it. The address for filing an appeal is as follows:

Environmental Appeals Board
U.S. EPA
Weststory Building (WSB)
607 14th Street, N.W., 5th Floor
Washington, DC 20005

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
UNIVERSAL EQUIPMENT CO.,	)	Docket No. TSCA-(PCB)-VIII-91-17
	)	
Respondent	)	

ORDER RESETTING EVIDENTIARY HEARING
AND RULING ON OUTSTANDING MOTIONS

On November 16, 1994, Complainant filed a motion to exclude evidence and on November 14, 1994, Respondent filed a motion seeking a continuance of the evidentiary hearing set for November 29, 1994. At a telephone conference on November 21, 1994, the Presiding Judge heard argument on these motions. The Respondent opposed the motion to exclude evidence and Complainant opposed the motion for continuance on the basis that it was prepared to go to trial.

Complainant's motion to exclude evidence was based on the fact that the Respondent had not included the documents listed as proposed exhibits when the Respondent made its prehearing exchange. However, the Respondent's prehearing exchange has been on file for an extended period of time and Complainant made no attempt to secure the documents involved before its recently filed motion to exclude. While Complainant should have these exhibits to review in preparation for the hearing, the procedural defect of the Respondent not serving the listed exhibits in its prehearing exchange is more appropriately remedied by requiring

the production of these documents, rather than excluding them from evidence. The purpose of a prehearing exchange is to facilitate discovery and assist the parties in the orderly presentation of their cases. If there is a procedural defect in the exchange, generally the more reasonable remedy is to correct the defect prior to trial, as opposed to pursuing the more drastic approach of excluding the evidence at hearing. As a result, the Complainant's motion to exclude was denied, but the Respondent was ordered to submit a revised prehearing exchange and serve it on the Complainant on or before January 17, 1995. This prehearing exchange shall include a list of Respondent's witnesses, together with summaries of their testimony, and copies of all documents Respondent intends to introduce as exhibits at the hearing.

Further, because of the extended time between the prehearing exchange and the setting of the hearing date, Respondent asked that the hearing be continued, to retrieve certain relevant documents that have been placed in storage and to relocate certain witnesses who are no longer with the Respondent. Under the circumstances, particularly in light of the fact that the Complainant has to be supplied with the Respondent's revised prehearing exchange sufficiently far in advance to permit proper trial preparation, the Respondent's motion for a continuance was granted.

Moreover, Respondent in its motion for continuance indicated that it may wish to file certain dispositive motions prior to

hearing, involving such matters as the Paperwork Reduction Act, Federal statute of limitations and vagueness of certain Agency regulations. In this regard, the Respondent was directed to file any such motions on or before January 17, 1995, the same time Respondent is required to submit its revised prehearing exchange.

It was also determined at the November 21, 1994 telephone conference that Complainant should be given time to file a reply to the Respondent's revised prehearing exchange. Therefore, Complainant was given until January 31, 1995, to file a reply to the Respondent's revised prehearing exchange. Also, Complainant will have the time provided in the EPA Rules of Practice to answer any dispositive motions filed by the Respondent. The January 17, 1995 deadline for filing motions by Respondent does not apply to motions that may relate to matters raised in the Complainant's January 31, 1995 reply to the revised prehearing exchange of the Respondent.

Further, at the November 21, 1994 telephone conference, the evidentiary hearing was rescheduled for 10 00 a.m. on Tuesday, March 21, 1995, in Toledo, Ohio. The Regional Hearing Clerk is directed to secure a court reporter and an appropriate hearing facility in Toledo for March 21 through March 24, 1995, and to advise the parties and the Presiding Judge of the hearing location no later than February 28, 1995.

Should either party need to request the issuance of subpoenas to compel the appearance of witnesses at the evidentiary hearing, any motion requesting such subpoenas must be

filed by February 28, 1995, unless good cause can be established for a later request. Also, any motion requesting the issuance of subpoenas should be accompanied by a prepared original and two copies of any subpoena being sought. On any such subpoenas, the parties may leave the hearing location blank to be filled in by the Presiding Judge if the motion seeking subpoenas is granted.

SO ORDERED.

Daniel M. Head
Administrative Law Judge

Dated: February 3, 1994
Washington, DC

IN THE MATTER OF UNIVERSAL EQUIPMENT CO., Respondent
Docket No. TSCA-(PCB)-VIII-91-17

CERTIFICATE OF SERVICE

I certify that the foregoing Order Resetting Evidentiary Hearing and Ruling on Outstanding Motions, dated November 23, 1994 was sent in the following manner to the addressees listed below:

Original by Regular Mail to:

Joanne McKinstry
Regional Hearing Clerk
U.S. EPA, Region VIII
999 18th Street
Denver, CO 80202-2405

Copy by Certified Mail to:

Counsel for Complainant:

Brenda Harris, Esquire
Office of Regional Counsel
U.S. EPA, Region VIII
Denver, Place, Suite 500
999 18th Street
Denver, CO 80202-2405

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Aurora Jennings
Legal Staff Assistant
Office of the Administrative
Law Judges
401 M Street, SW
Wash. DC 20460

Dated: November 23, 1994
Washington, DC